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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

K.B., through her Next Friends and Parents,
Dennis Bickford and Pamela Bickford;
DENNIS BICKFORD; PAMELA BICKFORD,
Petitioners,

vs.

ANCHORAGE SCHOOL DISTRICT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT No. 98-36048

PETITION FOR WRIT OF CERTIORARI

K. B., through her parents
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QUESTIONS PRESENTED

1. If federal district courts are courts of limited, original jurisdiction with no power to sit as appellate tribunals over state court or administrative proceedings, is an action brought in a federal district court pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(e)(2), by a party aggrieved by a state administrative agency decision, an "original civil action" or is the action an "appeal" of an administrative decision with restrained judicial review?

2. If, pursuant to 20 U.S.C. § 1415(e)(2), a party requests consideration of a educational agency's recent memorandum entitled "GRADING ISSUES for Special Education Students," did the district court err by denying consideration and concluding that, although "the court shares the parents' concern about grades," grades are "certainly some evidence of achievement" and "as a matter of law the individualized education plans developed for K.B. were reasonably calculated to enable K.B. to receive educational benefit." ?

3. Whether the district court erred in concurring with the findings and decision of the state review officer in concluding the procedural violations "found or claimed" "did not result in a loss of educational opportunity or seriously detract from K.B.'s parents participation in the IEP process." ?

PARTIES TO THE PROCEEDING

The petitioners are:
K.B., by her next friends and parents, Dennis Bickford and Pamela Bickford; Dennis Bickford, and Pamela Bickford.

The respondent is the Anchorage School District.

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OPINIONS BELOW

The opinion of the court of appeals (App.A, *infra*, 1a), the opinion of the district court for the district of Alaska (App.B, 2a-21a), and decision of the Alaska Department of Education (App.E, 28a-45a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 2000. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et. seq.* ("IDEA") (West's U.S.C.A. 1990), provides in relevant part:

1. **20 U.S.C. § 1400(c). Purpose.**
   It is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified in section 1412(2)(B) of this title [between the ages of three and twenty-one years], a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

2. **20 U.S.C. § 1415(c). Review by State Agency.**
   If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may *appeal* to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an *independent* decision upon completion of such review (emphasis added).

3. **20 U.S.C. § 1415(e)(2). Civil action; jurisdiction.**
Any party aggrieved by the findings and decision made under subsection (b) of this section, who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring *a civil action* with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. *In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.* (emphasis added).

STATEMENT OF THE CASE

This case presents issues under the IDEA concerning the Anchorage public school system's responsibility to protect the civil rights of all students attending the Anchorage School District and the public school system's responsibility to provide a free appropriate public education to K.B.

K.B. transferred to the Anchorage School District from the Fairbanks public school system and was entitled to special education services and speech-language services shortly after the beginning of the school year. K.B. had been referred, identified, and provided special education and speech-language services when she was in kindergarten in 1988 and continued to need special education services and speech-language services when her IEP was reviewed on June 6, 1992, by the Fairbanks IEP team at the end of the '91-'92 school year. As planned, the Bickford's moved to Anchorage during the summer.

A misunderstanding occurred on the date of enrollment. When her mother registered K.B. at Bear Valley Elementary School on August 26, 1992 Mrs. Bickford completed the enrollment form, indicating K.B.'s eligibility for special education and speech therapy, and informed school staff that K.B. had received special education and speech services in Fairbanks. At that time, Mrs. Bickford was informed someone from special education would contact her.

At the first parent-teacher conference of the year the Bickfords inquired about special education services, but, K.B.'s teacher, Mrs. Howell, was not aware of K.B.'s special education needs.

The resource teacher, Sharon Lester, telephoned in early November and informed Mrs. Bickford the school needed to evaluate her daughter and offered a choice between a comprehensive evaluation and an unspecified lesser evaluation, suggesting the comprehensive evaluation would be more beneficial.

The following facts are from the "Timeline" submitted by the School District for the '92 - '93 School Year (ER 1-7) [ ] indicate additions:

On October 6, 1992 Sharon Lester received K.B. school records from Fairbanks. "K. started receiving informal special education services as of this date."

[Parents were not contacted.]

On October 20, Sharon called the special education teacher from K. former school in Fairbanks.

On October 27, that teacher "left a message for Sharon."

On October 28, Sharon Lester called Fairbanks teacher.

On November 6, Sharon contacted Mrs. Bickford. [The timeline indicates that a NOPA was initiated on 11-6-92. Mrs. Bickford testified she did not receive the notice until she received a copy in the exchange of documents for mediation. Hence, did not know of services.]

December 17, 1992, The first IEP meeting was convened. [Psychological evaluation report, Determination of Eligibility Report, and Draft IEP presented.]
[At the December 17th IEP meeting, the school district proposed an IEP that the Bickfords rejected because they thought it did not address all of K.B.'s needs, of particular concern was her "auditory processing" problems and history of poor reading achievement.]

January 12, 1993, Sharon contacted Mrs. Bickford by phone. Mrs. Bickord requested an independent evaluation.

January 21, A meeting was convened at Mrs. Bickford's request to discuss psychologists reports.

January 29, Written invitation to 2/11/93 IEP meeting.

February 10, Mrs. Bickford called to cancel the meeting.

February 11, Sharon called to schedule meeting 3/4/93.

March 4, IEP meeting. No evaluation. No agreement.

March 15, Ed. Scherer called Mrs. Bickford regarding the request for services. [Mrs. Bickford requested the reading therapy be included on K.B.'s IEP, but the request was denied. K.B. completed the LMB program and made significant progress in identified areas of language processing.]

March 18, Sharon received a letter from Mrs. Bickford requesting an independent evaluation and informing Sharon that K. B. would be attending the reading clinic on 3/23/93. [There was no response to the request for an evaluation.]

March 23, Ed Scherer sent a letter to Mrs. Bickford denying reimbursement for the reading clinic services.

April 15, Sharon schedules an IEP meeting for 4/21/93.

"4/?/93" Ed Scherer ad Sharon attend Lindamood-Bell Clinic at the Dimond Center "to gather information."

April 21, IEP Completed. Added note: "[K] has received special education services in the regular classroom since 10/6/92 in the areas of reading, math, ad written expression. Patricia Kennedy, Special Education Teacher, provided these services."
[Based on the new information regarding K.B.'s progress the IEP team met on April 21, revised the proposed IEP to include objectives the Bickfords thought would be follow-through activities from the reading clinic. Mrs. Bickford again requested reimbursement and Mr. Scherer told her to send the request to his office. The copy of the IEP the Bickford's received at the end of the meeting did not contain the goal revisions and obtaining a correct copy from the resource teacher had been taxing.]

May 25, "Ed receives a letter from Mrs. Bickford again requesting payment for Lindamood-Bell Clinic." [Request denied.]

Continuation of Timeline for '93 - '94 School Year:

"11/?/93" "At parent/teacher conferences, Mrs. Bickford requested a meeting to talk about Kathleen's IEP."

December 16, Meeting called by Mr. Bickford regarding misunderstanding about IEP and K.B. progress.

April 7, Parent/teacher conference, Mrs. Bickford gave draft IEP document to the classroom teacher.
[Mrs. Bickford, concerned about K.B.'s progress in reading, proposed a document based on a dictionarys' pronunciation guide to help assess K.B.'s decoding-encoding progress.]

April 21, Annual review IEP meeting.
[In preparation for the April 21, 1994 annual review meeting, Mrs. Bickford arranged to have K.B. evaluated by a retired teacher who administered a Slingerland screening test. The test results indicated further problems basic to reading, writing and language processing. However at the meeting, staff presented the past IEP with daily classroom grades added.]
[The Bickford's did not agree with the review of the '92- '93 IEP nor did they agree with the proposed '93 -'94 IEP and requested an "independent educational evaluation."]

April 25, Toni Pemberton, Teacher Consultant, called Mrs. Bickford regarding the Slingerland test and requested a copy of the test.

April 26, Toni Pemberton writes NOPA regarding an IEP meeting on May 12, 1994. [Slingerland expert will attend.]

May 12, IEP meeting. Mrs. Bickford taped the meeting. [There was no agreement on an IEP so the school district mailed the Bickfords a copy of the district's proposed IEP notifying them it would be implemented. Mrs. Bickford responded with a written request for an independent evaluation and a written request for a due process hearing to define an education plan for K.B. and to request reimbursement for prior expenses.]

May 20, Robyn Rehmann, Director of Special Education receives a letter from Mrs. Bickford requesting summer school and independent evaluation.

May 31, Robyn Rehmann denied summer school. "The request for independent evaluation was forwarded to John Stamm."

June 6, Team meets with Karla Strutzel as requested by John Stamm to help with Lindamood-Bell concepts. [John Stamm had left a message for Mrs. Bickford alerting her to the scheduling of this meeting, but it was not received until the following morning, just prior to the meeting.]
[End of timeline.]

June 22, Mrs. Bickford receives letter from Advocacy Services of Alaska informing her they would not be able to represent the Bickfords in the due process hearing.

June 30, Mrs. Bickford obtained a speech language evaluation who recommended that due to K.'s "immature auditory processing abilities" she would benefit from intensive services.

June meetings, Hearing Officer Katcher, suggested the school district arranged for Dr. Truch, of The Reading Foundation in Calgary, Alberta, to travel to Anchorage and evaluate K.B. When evaluations were completed the parents and school met on three occasions in August and September '94 for mediation. Mediation failed. The hearing was then continued numerous times due to the scheduling conflicts between the school district and Hearing Officer Katcher. The final scheduled date for the hearing was in October.

Mrs. Bickford contacted the State educational agency and complained. The school district then arranged a second hearing officer, Sheila Gallagher, who met with the parties in December and set a date for hearing in February, 1995.

January 6, 1995 The parents hired an out-of-state special education attorney.

K.B. continued to have serious difficulty with reading. The Bickfords arranged for K.B. and Mrs. Bickford to travel to Calgary, Alberta so K.B. could attend The Reading Foundation for remedial instruction in reading, math and written language.

The due process hearing was continued to allow the school district to evaluate K.B. when she returned home.

The hefty 732 paged transcript of the April 10-12, 1995 hearing documents that each of the parent's alleged violations of law, as identified below, are based on facts in the administrative record.

1) the school district did not provide K.B. with special education services from her enrollment until October 6, did not inform or involve the parents in those determinations, and from October 6 to April 21 provided "informal" special education without having an IEP in effect, in violation of 34 C.F.R. § 300.342;

2) the school district failed to assess K.B. in all areas of her suspected disability when the school district conducted the comprehensive evaluation, in violation of 34 C.F.R. §§ 300.530-300.534, and 300.540-300.543;

3) the school district did not provide proper written notice when the Bickfords requested LMB language services be included in K.B.'s education plan, requested reimbursement, and requested extended school year services, in violation of 34 C.F.R. §§ 300.504-300.505;

4) the school district failed to ensure that K.B.'s last agreed upon IEP remained in effect during the pendency of the due process proceedings, 34 C.F.R. § 300.513; and

5) the school district did not convene an IEP meeting or an evaluation team meeting to consider June 94 independent evaluation by Kit Roberts, a speech-language pathologist or August 94 evaluation by Dr. Truch, a cognitive psychologist. 4 AAC 52.540(b).

Bickfords' alleged each of the school district's proposed programs were inappropriate because they did not address her difficulties with listening, speaking reading and writing, did not provide goals and objectives to remediate her educational needs, and did not provide objective measures of assessment to determine progress or regression.

Conversely, throughout, the school district maintained its view that K.B. was provided "informal" special education services during the period of time the IEP was under development, her IEPs were appropriate and/or adequate as she had received good grades, achieved the goals set in her IEP, and had advanced from grade to grade. It was the school district's position that her IEP conveyed benefit and therefore no other services were necessary.

However, the hearing officer overlooked the primary purpose of the request for a due process inquiry, as requested in Mrs. Bickford's June 5, 1994 letter, an appropriate education program for K.B. specific to her educational needs. The school district's procedural barriers, inadvertent or deliberate, were formidable and it was clear to K.B.'s parents that an appropriate IEP would need to be developed by an impartial party with expertise in special education. An identified issue before the hearing officer, the school district's obligation to ensure that K.B.'s last "agreed-upon IEP" remain "in effect," should have signaled a need for procedural safeguards and procedural compliance. If due process hearing officers can overlook their duty to preserve and protect the educational rights of a student, do we grant the identical capacity to courts to ignore educational rights as well.

REASONS FOR GRANTING THE PETITION

In the Education of the Handicapped Act, 84 Stat. 175, as amended, Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et. seq. ("IDEA"), Congress sought "to assure that all handicapped children have available to them, . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, . . . that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children." 20 U.S.C. § 1400(c).

When the law was passed in 1975, Congress had before it ample evidence that such legislative assurances were sorely needed. In 1954, this Court declared education to be "perhaps the most important function of state and local governments," in *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954). Congressional studies found an alarming number of school age children were "excluded from the public school system," "were simply warehoused" in special classes or were neglectfully shepherded through the system until they were old enough to drop out." See, *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 597 (1988). Justice Brennan further stated:

> Congress recognized that the problem reflected more than a lack of financial resources at the state and local levels." * * * In responding to these problems, Congress did not content itself with passage of a simple funding statute. Rather, the EHA confers upon disabled students an enforceable substantive right to a public education in participating states (citations omitted), and conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act.

Honig, 484 U.S. at 311. Congress' intent has not altered but educational agencies now employ legal strategies to deny disabled students a substantive right to a public education. This case illustrates an alarming tendency for school districts to characterize the original civil action brought in a federal district court as an appeal from a decision of an administrative agency thereby narrowing judicial review.

Under the IDEA, a substantive right to an education is defined as a "free appropriate public education" tailored to meet the unique educational needs of a child through implementation of an "individualized education program" (IEP). *See* 20 U.S.C. §§ 1401(18). The IEP is a written statement of the child's present level of education performance, annual goals with short-term instructional objectives, specific educational services to be provided the child and the extent to which the child will participate in the regular educational programs, the projected dates of initiation and anticipated duration of those services, and appropriate objective criteria and evaluation procedures for determining, on at least an annual basis, whether instructional objectives are being achieved. *Id.* § 1401(19).

The child's educational placement, whether enrolled in a public school, a private school, or a parochial school, must be based on an IEP that is developed and implemented in accordance with federal regulations 34 C.F.R. §§ 300.341-300.350. *Id.*, §§ 1412(2)(B), (4), (6), 1413(a)(4)(A), (B), and 1414(a)(5); Pub. L. 94-142, sec 8(c) (1975). IDEA requires all states receiving federal funds for education to have in effect a policy and procedures that assures all handicapped children within their state "the right to a free appropriate public education." *See* 20 U.S.C. § 1412(1), (5), and (6).

The IDEA provides parents with numerous procedural safeguards. *See*, 20 U.S.C. § 1415(b). Specifically at issue in this question, parents are entitled to an "impartial due process hearing" to present their complaints regarding "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" provided by the school district, *Id.* § 1415(b)(1)(E); an "appeal" to the State educational agency "which shall conduct an impartial review." *Id.* § 1415(c); and, "shall have the right to bring a civil action" in a district court without regard to the amount in controversy. *Id.* § 1415(e)(2).

In recognition of the responsibility of the state and local educational agencies, the IDEA does not accord parents the right to file suit in federal court to redress the denial of an appropriate education or other rights protected by the IDEA. Rather, Congress created a detailed administrative scheme for aggrieved parents to pursue and exhaust prior to filing a federal claim. *See Dellmuth v. Muth*, 491 U.S. 223, 225, 109 S.Ct. 2397, 2398-99, 105 L.Ed.2d 181 (1989); *Honig v. Doe*, 484 U.S. at 308, 108 S.Ct. at 596, *Smith v. Robinson*, 468 U.S. 992, 1010-11, 104 S.Ct. 3457, 3467-68, 82 L.Ed2d 746 (1984). This exhaustion requirement was intended to give state and local educational agencies the opportunity to meet the needs of children on a local level in an informal, expedient process that "[n]o federal district court presented with a constitutional claim to a public education can duplicate." *Smith*, 468 U.S. at 1012. Further, exhaustion serves the reviewing federal court in several useful functions:

> "(1) permitting the exercise of agency discretion and expertise on issues requiring these characteristics; (2) allowing the full development of technical issues and a factual record prior to court review; (3) preventing deliberate disregard and circumvention of agency procedures established by Congress; and (4) avoiding unnecessary judicial decision by giving the agency the first opportunity to correct any error."

See, Association for Commun. Living v. Romer, 992 F.2d 1040, 1044 (10th Cir. 1993). This brings us to the question presented by this case regarding the role of a federal district court under the IDEA when the administrative remedies have been exhausted and the statutory claims are brought to federal district court. Is an IDEA action an "original civil action" or is the action an "appeal" from an administrative decision ?

In general, our system of federalism dictates that courts characterize IDEA actions as original civil actions instead of appeals. Our judiciary is separated into two distinct systems: a state court system and a federal court system. In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed.2d 362 (1923), this Court established a fundamental principle that governs any discussion in this area. Lower federal courts lack jurisdiction to entertain appeals from

state court judgments because that power is reserved exclusively to the United States Supreme Court. *Id.* at 416, 44 S.Ct. 149. Thus, a case proceeding in both a state court and in a federal court or cross-system appeals from state courts to federal courts are not contemplated by our system of federalism. See *Burford v. Sun Oil*, 319 U.S. 315, 327 (1943).

These principles also apply in the administrative realm. Although judicial review of administrative agency action is a fixture of our modern administrative state, generally federal courts review federal agencies and state courts review state agencies. Federal courts have no general appellate authority over state courts or state agencies. A district court is a court of original jurisdiction, not an appellate tribunal, and is without jurisdiction to review an appeal taken administratively or judicially in a state proceeding. See, *Chicago, Rock Island & Pac. R.R. v. Stude*, 346 U.S. 574, 581, 74 S.Ct. 290, 98 L.Ed. 317 (1954). The Ninth circuit court found

> "We agree with the other circuits. Appellate administrative review is very little like a civil action in the usual sense. Furthermore, the prospect of a federal court sitting as an appellate court over state administrative proceedings is rather jarring and should not be quickly embraced as a matter of policy."

Shamrock Motors, Inc. v. Ford Motor Co., 120 F.3d 196, 200 (9th Cir.1997). However, in determining whether an action is an original civil action or an appeal, this Court must interpret the statute providing direction to district courts, § 1415(e)(2).

The court must begin with the language of the statute and the court should not look beyond that language unless these is ambiguity or unless the statute as literally read would contravene the unambiguously expressed legislative intent gleaned from the statute's legislative history. Statute 20 U.S.C. § 1415(e)(2) makes specific reference to a "civil action," not an "appeal." The drafters clearly knew the distinction between a civil action and an appeal. While the statute explicitly affords an aggrieved party a right to *appeal* from a local educational agency to a state review officer, *see id.* § 1415(c), it explicitly gives an aggrieved party who has exhausted his administrative remedies the right to "bring a *civil action*" in federal or state court. §1415(e)(2).

This distinction was deliberate. When the House of Representatives first passed the predecessor statute to the IDEA, the language provided for appeals to be taken from both the initial local agency and the state review officer's decision. That language was dropped, however, and replaced with the present statutory language, which grants the aggrieved party the right to "bring a civil action" following the state review officer's decision. *See* U.S. Code Cong. & Admin. News 1480, 1501, 1503 (1975); *see also Tokarcik v. Forest Hills School Dist.*, 665 F.2d 443, 448 (3d Cir.1981).

Congress's authorization of a federal court action after state administrative remedies have been exhausted does not represent a departure from the long-established principles of federalism. Rather, the procedural scheme established by the IDEA reveals Congress's intent to provide aggrieved persons with an *external* check on the state administrative action. As the Third Circuit in *Tokarcik* stated,

> ...in providing for *independent* court review, Congress apparently intended to create an external check to guard against possible procedural deficiencies or institutional pressures inherent in the educational administrative system. Rather than affirming, reversing or remanding an agency decision, courts are required to decide upon an educational placement which conforms to their understanding of the aims and terms of the Education Act.

Tokarcik v. Forest Hills Sch. Dist., 665 F.2d 443, 451 (3d Cir.1981) (emphasis added). With these principles in mind, it is clear that an IDEA action filed in federal district court must be characterized as an original "civil action" instead of an "appeal." This characterization clarifies without offending controlling authority in *Rowley* and *Burlington*, that provide clear direction in proceeding in cases brought to a federal district court under this Act.

The external check to guard against possible procedural deficiencies or institutional pressures is a statutorily mandated assurance that the federal district court will "independently" analyze a case brought under the IDEA.

In 1982, this Court defined the *Rowley* two prong inquiry for determining whether a "free appropriate public education" had been made available to a particular child under federal law, thereby determining whether the services offered were "appropriate" or not. If a local hearing officer improperly applies the *Rowley* test, and the supportive evidence is found in the record of the state administrative proceedings, it becomes the duty of the federal district court to properly apply the *Rowley* test.

The first prong of the *Rowley* inquiry asks whether there has been procedural compliance with the mandates of the IDEA and its implementing regulations. The second prong of the inquiry asks whether the offer of services was substantively appropriate to meet that student's unique educational needs and confer "educational benefit" to the child thereby demonstrating substantive compliance with the IDEA. In the event the answer to both prongs of the *Rowley* inquiry is in the affirmative, then, and only then, can a trier of fact determine that the educational agency proposed an appropriate program for the child as mandated by IDEA.

Conversely, if the subject educational agency has either failed to comply with the procedural requirements set forth in the IDEA and its Federal and State regulations, or has failed to make available educational services which meet the student's unique needs, then that agency has failed to meet the obligations imposed by Congress, and thus cannot be deemed to have proposed an "appropriate" education. Such an agency would fail *Rowley's* two prong test and the programs proposed must be found inappropriate. *See Board of Educ. v. Rowley*, 458 U.S. 176, 206-207, 102 S.Ct. 3034, 3051, 73 L.Ed.2d 690 (1982).

Then in *Burlington*, this Court added a second two prong analysis to be employed when determining whether parents of children with disabilities should be reimbursed for the costs associated with their unilateral provision of services to their child. This Court found that such parents are entitled to reimbursement when a trier of fact, whether it is the initial trier of fact, or this Court reviewing the facts and determines

that: 1) the programs proposed by the School District for the time period in question were not appropriate; and 2) the services provided by the parents were proper. *Town of Burlington v. Department of Education*, 471 U.S. 359, 370, 102 S.Ct. 1996, 2002 (1985). Both cases, *Rowley* and *Burlington*, demand both the procedural analysis and the substantive analysis of "appropriate" as to the agency's compliance with the Act. Therefore, what deference is due the findings and decision of the state administrative agency in cases arising under the IDEA has created confusion among district and circuit court.

John E. Theuman, in *Obligation of Public Educational Agencies, Under Individuals with Disabilities Education Act (20 U.S.C.A. §§ 1400 et. seq.), to Pay Tuition Costs for Students Unilaterally Placed in Private Schools - Post-Burlington Cases*, 152 ALR Fed 485 (1999), states that early decisions on this issue came to mixed conclusions, as some court took the position that parents waived their right to reimbursement for a unilateral placement and other courts allowed reimburse-ment "where there were gross or prolonged violations of the IDEA" by the school district. This view was decisively rejected in *Burlington* which authorized courts which reviewed administrative determinations under the IDEA to "grant such relief as the court determines is appropriate." See, §1415(e)(2). Theuman states:

> Further articulating the two main elements of the *Burlington* rule, some courts have held that failures by public school officials to comply with the procedural requirements of the IDEA - such as failure to hold required hearings or to propose an appropriate IEP in a timely manner - may be sufficient grounds to hold that the public school failed to offer an appropriate placement to the child in question, particularly if such violations compromised the student's right to an appropriate education, seriously hampered the parents' opportunity to participate in the IEP formulation process, or caused a deprivation of educational benefits.

Theuman, at 501-2. These 118 annotated cases demonstrate the first element of the *Burlington* rule is not determinative as other factors beyond the procedural question affect a

request for reimbursement (failure to show disability, lack of prior action or notification by parents, sectarian nature of the private program, etc.), but when the question is focused on reimbursement based on whether or not the first element of Burlington was satisfied, there is no discernable standard as to what "technicality" counts as a procedural violation and what is an excusable mistake.

For example, the Sixth Circuit held in *Cleveland Heights - University Heights City School Dist. v. Boss*, 144 F.3d 391, 126 Ed. Law Rep 633 (6th Cir. 1998), the parents were entitled to reimbursement on remarkably similar defects in the IEP and ultimately finding that "the omissions were not merely technical, but went to the heart of the substance of the plan." *Theuman*, at 537. Contrastingly, in *Kathleen H. v. Mass. Dept. of Educ.*, 154 F.3d 8, (1st Cir. 1998), the hearing officer found "technical" deficiencies in the IEPs "including a failure to specify the child's current level of performance and his learning style, a failure to provide sufficient criteria for measuring his achievement, a failure to specify individualized instruction and counseling, and a failure to gather all relevant information before writing the IEP." *Theuman*, at 533. The hearing officer concluded the school district did not act in bad faith and the child had not been denied substantive services. The review officer, district court and First Circuit affirmed the local officer's decision. Two similar cases, contrary by decision, based on the courts "technical" distinction as to whether or not an identified or admitted procedural violation denied a child an education.

This confusion among courts may have been a result of the "borrowing" doctrine, which requires a federal court to borrow from the state the most analogous state statute of limitations. *See DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 158, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). The Ninth circuit court of appeals has analogized IDEA actions to appeals from administrative agencies in adopting a short statute of limitations period. *See, e.g., Livingston Sch. Dist. Nos. 4 and 1 v. Keenan*, 82 F.3D 912, 916 (9th Cir.1996) (applying Montana's thirty day statute of limitations applicable to judicial review of administrative appeals). Other circuit court of appeals have adopted statute of

limitations periods that are considerably longer. For example, the Seventh circuit court of appeals applies a 120 day statute of limitation for judicial review of administrative decisions, *see Dell v. Board of Educ.*, 32 F.3d 1053, 1060 (7th Cir.1994). There is nothing inconsistent in holding that a § 1415(e)(2) action is an original civil action yet borrowing the state statute of limitations applicable to judicial review of administrative agency actions.

This confusion, despite the clear statutory language, may also stem from the manner in which district courts describe their duty to evaluate the "records of the administrative proceedings" and may have led some courts to conclude that an action initiated pursuant to 20 U.S.C. § 1415(e)(2) should be characterized as a "appeal" instead of as an "original civil action." The district court in *Fritschele v. Andes*, 25 F.Supp.2d 699, 702 (D.Md.1998) referred to IDEA claims as appeals and cross-appeals. This confusion has occurred because although courts are statutorily required to conduct an independent review of the administrative record, courts, including the court in this case, have adopted a judicial construct that is highly deferential to the state administrative agency.

An alarming recent example, the Fourth circuit court of appeals requires district court to give deference to the findings of the administrative hearing officer and held that "administrative findings in an IDEA case 'are entitled to be considered prima facie correct.'" *Hartman v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1000-01 (4th Cir.), *cert. denied*, 522 U.S. 1046, 118 S.Ct. 688, 139 L.Ed.2d 634 (1998) (quoting *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 105 (4th Cir.1991).

Doyle v. Arlington was cited by the state reviewing officer in analyzing the standard of judicial review and finding that "administrative appeal authority must adhere to the 'fact-finding norm' when reviewing the [] hearing officer's findings, and those findings "are entitled to prima facia correctness." (App. E, 31a).

This suggests that in his view, a state review officer's application of the law is bound by a standard of deference suggesting clear error must be shown in order to alter either the findings or the decision below, and lead the district court to assume the fact-finding was complete as the district court then characterized its role as "district court review as provided in 2[0] U.S.C. § 1415(e)(2)" and provides the text of the statute (See, App. B, 3a). It is not clear that the district court understood this case was an original action before the court rather than an appeal review.

The district court's decision below, as virtually all court decisions under the IDEA, reference *Rowley*, and directly quote the decision regarding the standard of review and deference due the state administrative decision. However, the district court's understanding of its role under IDEA is unclear. Petitioners submit the court's misunderstanding in this case caused the court to err as follows.

2. The District Court's September 24, 1998 decision references motion practice on the subject of whether additional evidence should be taken (App. B, 4a). Bickfords motioned the court to consider additional evidence on the issue of grades and whether or not report card grades were a reliable measurement of "educational benefit" or achievement. The memorandum, "GRADING ISSUES for Special Education Students" was obtained from a member of the school board. The first item on grading special education students states:

"Special education students must show educational benefit -

a. meeting IEP goal/objectives,

b. passing grades, and

c. promotion from grade to grade."

See App. C. This document was the subject of the deposition of Dr. Jan Schnorr, Professor of Education, University of Alaska, Anchorage. Dr. Schnorr was identified as an expert witness for the School District but did not testify. However, following the hearing she distributed this document to her graduate level education class at the University referencing this case. Mrs. Bickford was alerted regarding this incident and the potential disclosure of personal information and deposed Dr. Schnorr regarding the

incident and the document. Bickfords then moved to consider additional evidence on the grading policy and practices of the School District. The consideration of additional evidence was argued in Clerk's Docket Nos. 20, 27, 30, 33 34, 35, 42, and 43.

The district court denied the motions "for there was no identified gaps in the extant record, nor was any showing made for a need to update the record." (App. B, 4a). The evidence was material and relevant to the issues before the court as K.B.'s good grades, excellent classroom behavior and the fact that she had achieved the goals and objectives on her IEP (also partially based on classroom grades), was the basis for the school district's position that K.B.'s IEPs were appropriate and conveyed benefit. Bickfords submit that if the district court viewed this case as an original civil action there would have been no grounds to deny the consideration of additional information regarding grading practices.

3. The documentary evidence, the testimony at hearing and the post-hearing brief to Hearing Officer Gallagher identified numerous procedural violations and substantive violations of the IDEA. The appeal brief to Review Officer Petersen maintained the expectations of the IDEA and controlling authority on the standard of review. The briefing before the district court maintained the same issues and the same expectation regarding the legal standards of "appropriate." The brief to the Ninth Circuit, appealed the consideration of the grading memorandum and the following:

1) The school district did not provide K.B. with special education services from her enrollment until October 6, did not inform or involve the parents in those determinations, and from October 6 to April 21 provided "informal" special education without having an IEP in effect.

2) The school district failed to assess K.B. in all areas of her suspected disability when the school district conducted the comprehensive evaluation.

3) The school district did not provide proper written notice when Bickfords requested: language services be included in K.B.'s education plan, requested reimbursement, and requested extended-school-year services. And alternatively, IEP team members directed the parent to seek approval by district administrators outside the IEP process, as the resource teacher testified that certain requests were not within the province of the IEP team to consider.

4) Bickford's Californian attorney requested K.B.'s complete school and educational records to prepare for the due process hearing. Mrs. Bickford discovered that the progress notes that would provide periodic updates corresponding with K.B.'s report cards were not included in the file as required by school district policy. Brad Owens, counsel for the School District, in response to a discovery request, provided the 5th grade progress notes and stated that the notes would be included in K.B.'s file (See, App. D.).

CONCLUSION

In summary, this petition for a writ of certiorari should be granted because of the clear departure of the decisions below from the standards of review and deference required by the decisions of this Court in *Rowley, Burlington, Honig,* and *Dellmuth,* and because of the exceptional importance of the questions presented to all federal district courts and to the administration of the IDEA.

Respectfully submitted.

K.B., through her next friends and parents, Dennis L. Bickford and Pamela L. Bickford
Dennis L. Bickford
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September 2000

Appendix A
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

K.B., through her Next Friends and Parents, Dennis Bickford and Pamela Bickford; DENNIS BICKFORD; PAMELA BICKFORD,
Plaintiffs-Appellants,
v.
ANCHORGE SCHOOL DISTRICT,
Defendant-Appellee.

No. 98-36048

D.C. No. CV-95-00398 HRH

MEMORANDUM[1]

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, Chief Judge, Presiding

Argued and Submitted June 6, 2000
Seattle, Washington

[Filed June 29, 2000]

Before:
HUG, Chief Judge, BRUNETTI and GOULD, Circuit Judges.

Appellants Pamela Bickford, Dennis Bickford, and K.B., a minor, each appeal the district court's denial of their claims under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et. seq. We affirm the denial of K.B.'s claims under IDEA and the Bickfords' personal claims for reimbursement for the reasons stated by the district court.

AFFIRMED.

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Appendix B
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

K.B., through her Next Friends & Parents, Dennis Bickford and Pamela Bickford, and DENNIS BICKFORD and PAMELA BICKFORD, Plaintiffs,	)	
vs.	)	
ANCHORGE SCHOOL DISTRICT Defendant.	)	No. A95-0398-CV (HRH)

[Filed September 24, 1998]
ORDER

K.B., a former student of the Anchorage school district with a learning disability, by and through her parents, seeks judicial review of the decision on appeal of the Alaska Department of Education with respect to her procedural and substantive rights under the Individuals with Disabilities Education Act (IDEA).[1] 20 U.S.C. §§ 1400-1491o. The Department of Education review officer, in a written decision,[2] affirmed the decision[3] of the school district hearing officer who had considered the matter. Both the school district and the Department of Education rejected K.B.'s parents' claims for reimbursement for expenses incurred by them for educational therapy in the form of K.B.'s attendance at Lindamood-Bell Learning Process Clinics (LMB). Whether K.B. should have been provided LMB services at school district expense requires this court to independently evaluate the school district's procedural and substantive compliance with the requirements of IDEA.

It is abundantly clear, indeed conceded, that there were a few procedural flaws in the school district's performance. On the entire record, however, as explained in detail below, the court finds that K.B. was afforded a free and appropriate public education through personalized instruction with

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[1] Plaintiff's Amended Brief, Clerk's Docket No. 86.
[2] R. at 2-25.
[3] R. at 201-16.

adequate support services to permit KB. to benefit educationally from instruction. 20 U.S.C. § 1412(1); Board of Educ. v. Rowley, 458 U.S. 176, 203, 210 (1982). The few procedural shortcomings on the part of the school district which have been identified did not in any substantial way cost K.B. educational opportunities, nor compromise K.B.'s right to an appropriate education, nor did they seriously interfere with, much less prevent, KB.'s parents from participating in the development of individual education programs (IEPs) for K.B. Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982 (4th Cir. 1990); Rowland M. v. Concord School Comm'n, 910 F.2d 983, 994 (1st Cir. 1990).

Jurisdiction

By the terms of the IDEA, K.B. and her parents were entitled to administrative review of the school district decision denying their claims for reimbursement of educational expenses. 20 U.S.C. §1415(c). Timely review of the school district hearing officer's decision was sought; and, after appropriate proceedings, the review officer of the Alaska Department of Education entered his decision on appeal.[4]

The IDEA further provides that the decision of the state educational agency "shall be final" except for district court review as provided in 28 U.S.C. § 1415(e)(2). 28 U.S.C. § 1415(e)(1). Subsection (e)(2) provides that a party aggrieved by the findings and decision of the state educational agency shall:

> have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines appropriate.

20 U.S.C. § 1415(e)(2).

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[4] R. at 2-25.

Plaintiffs' complaint is one falling within the above described jurisdiction of this court.

Standard of Review

As a consequence of proceedings early in this case, the parties conferred and agreed upon an excerpted record of the administrative proceedings which gave rise to plaintiffs' complaint.[5] The record is contained in four large envelopes. The first two envelopes contain the paper record of the school district and the Department of Education proceedings, identified serially by page numbers "R-0001" through "R-1243". The third envelope contains the due process hearing transcript of testimony taken before the school district hearing officer. The fourth is identified as a table of cases, and contains reprints of numerous relevant court decisions.

The court has independently reviewed the entirety of the paper record as well as the transcript of testimony taken at the due process hearing. The court's own findings and conclusions are based upon that review.

In the early stages of this case, there was motion practice on the subject of whether additional evidence should be taken. The court ultimately concluded that there was no cause to take additional evidence in this case, for there was no identified gaps in the extant record, nor was any showing made for a need to update the record.[6]

In a case such as this, the court's job is to base a decision upon a review of the administrative record; but, unlike most other administrative review proceedings, this statute authorizes and directs the court to base its decision "on the preponderance of the evidence." 20 U.S.C. § 1415(e)(2). This standard of proof necessarily implies that the court is to exercise its own independent judgment with respect to the evidence. In an earlier order, the court discussed at some length the case law gloss which is placed upon the statute and this court's duty to make a decision on the preponderance of the evidence whereby it is required that

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[5] Clerk's Docket No. 93.
[6] Clerk's Docket No. 89.

the court "must give deference to the state hearing officer's findings, particularly when . . . they are thorough and careful."[7] Seattle School Dist. No. 1 v. B.S., 82 F.3d 1493, 1499 (9th Cir. 1996). In developing this order, the court felt some frustration (and may have conveyed the same in its order) over what sounded like conflicting directions. On the one hand, the statute requires the court to make its own decision employing the preponderance of the evidence standard, whereas case law requires the court to give deference to the state hearing officer's findings when they are thorough and careful. This direction derives from the Supreme Court's holding in Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), in which the United States Supreme Court admonished district courts that they must not "substitute their own notions of sound educational policy for those of the school authorities which they review."[8] The Supreme Court continued:

> The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought. The fact that § 1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings. And we find nothing in the Act to suggest that merely because Congress was rather sketchy in establishing substantive requirements, as opposed to procedural requirements for the preparation of an IEP, it intended that reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself. In short, the statutory authorization to grant "such relief as the court determines is appropriate" cannot be read without reference to the obligations, largely procedural in nature, which are imposed upon recipient States by Congress.

Id. at 206.

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[7] Clerk's Docket No. 73 at 4-10.

[8] See also, Seattle School Dist. No. 1 v. B.S., 82 F.3d 1493 (9th Cir.1996).

In the foregoing passage, the Supreme Court is plainly expressing concern that district judges - left to their own devices and applying a statute which is long on procedure but short on substantive requirements - might take over the substantive functions of the school district. Despite the statutory "preponderance of the evidence" test, this court must, and will, defer to the thoughtful and careful findings which have been made in this case by the school district hearing officer as well as the review officer of the Department of Education.

Plaintiffs seek reimbursement for expenses incurred in providing K.B. with LMB therapy. In order to prevail, plaintiffs must establish that the IEP developed by the school district was inappropriate under IDEA and, instead, that the services for which plaintiffs seek reimbursement were appropriate. The court must under-take a three-part inquiry in determining if the plaintiffs have met their burden. Town of Burlington v. Dept. of Educ., 471 U.S. 359, 370 (1985). First, the court must determine if the procedural requirements dictated by IDEA were satisfied. However, only procedural violations which result in the loss of educational opportunity or seriously infringe the parents' opportunity to participate in the IEP formulation process are inappropriate under IDEA. W.G. v. Bd. of Trustees of Target Range School Dist., 960 F.2d 1479 (9th Cir. 1992). Second, the court must consider whether the substance of the individualized education programs developed for K.B. were reasonably calculated to enable her to receive educational benefits. Rowley, 458 U.S. at 207. Finally, if the court concludes that the services offered by the school district were inappropriate, the plaintiffs would be entitled to reimbursement only if the LMB therapy provided by the parents was necessary to confer educational benefit and constituted an appropriate education. Id. at 182.

Findings of Fact

The designated hearing officer of the school district conducted the due process hearing requested by K.B. and her parents. After hearing testimony offered by the parties and receiving exhibits offered by them, the hearing officer entered a decision consisting of detailed findings of fact and

conclusions of law. [9] The hearing officer's findings are not vague or general; they address the specifics of what transpired between the school district, K.B., and her parents. Based upon the court's independent review of the record and the transcript of the due process hearing, the court finds that the district hearing officer's findings are both thorough and carefully drawn.

In his turn, the Alaska Department of Education review officer likewise made findings of fact and conclusions of law.[10] The review officer emphasized that he was making an "independent review" of the facts, procedure, and law.[11] Here too, the court finds that the review officer's findings are neither vague nor generalized, but are thorough and careful in their reflection of the essence of the testimony and other evidence presented in favor of and opposed to K.B.'s claims.

It being abundantly clear that both hearing officers did a careful, even-handed job of evaluating the evidence, their findings are entitled to deference. Seattle School Dist., 82 F.3d at 1499. Moreover, the court must give "due weight" to judgments of educational policy and not substitute its ideas of sound educational policy for those decisions of school authorities which the court reviews. Id. The court has approached the preparation of these findings and conclusions with deference to school district policy.

Consistent with the findings of the hearing and review officers, affording due weight to the judgments of educational policy made by school authorities, and based upon the court's independent review of the record, the facts pertinent to this case are as follow.

(1) Until the 1992-93 school year, K.B. was enrolled in schools in the Fairbanks North Star Borough school district. There she had been evaluated and determined to have a learning disability, entitling her to special education services in connection with learning disabilities which affect her math, reading, and written language skills. In the Fairbanks

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[9] R. at 201-216.
[10] R. at 2-25.
[11] R. at 0005.

schools, she received special education services under an IEP agreed to by her mother. The IEP provided for math, reading, and written language assistance.

(2) K.B. and her parents moved to Anchorage, Alaska, and K.B. was enrolled in the Anchorage school district (Bear Valley Elementary School) on August 26, 1992. K.B. was enrolled in the fourth grade. The enrollment papers disclosed that K.B. was entitled to special educational services. Nevertheless, K.B. was placed in a regular fourth grade classroom and received no special education services during the early weeks of the school year.

(3) K.B.'s Fairbanks school records arrived in Anchorage at the Bear Valley School on or about October 6, 1992, whereupon teachers realized that K.B. was entitled to special education services. It was then noted that K.B.'s Fairbanks IEP had expired[12] on September 27, 1992, shortly after commencement of K.B.'s fourth grade school year. Special education services were provided to K.B. promptly after receipt of her Fairbanks school records, employing her last IEP as a temporary education plan pending development of a new IEP.

(4) Except for some shyness (which the record reflects was well compensated by the following year), K.B. was performing at the same level as the rest of her class at Bear Valley School without special education services; her Bear Valley teacher was surprised to learn of K.B.'s disability.

(5) In November of 1992, with notice to K.B.'s parents, the Anchorage school district formed a multi-discipline team which evaluated K.B.'s educational needs. The decision to perform a reevaluation rather than simply updating the Fairbanks IEP was one made jointly by the school district and K.B.'s parents. By December of 1992, an evaluation report was available. There followed a long series of

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[12] Alaska law provides that an IEP must be reviewed "on an annual basis or more frequently if conditions warrant." 4 AAC § 52.140(d). Since the IEP prepared by the Fairbanks school district was adopted on September 27, 1991, Alaska law requires that it was due to have been reviewed by September 27, 1992.

meetings between the school district team and, principally, K.B.'s mother. The new IP was not finalized until an April 21, 1993, meeting with K.B.'s parents, at which time they concurred in the new IEP, essentially that proposed by the school district in December of 1992. The IEP provided for five hours of special education per week in K.B.'s deficit areas: reading, mathematics, and written expression.

(6) The principal bone of contention between the school district team and K.B.'s parents as regards the new IEP was the matter of whether K.B.'s IEP should include LMB therapy as advocated by Dr. Truch. Dr. Truch had evaluated K.B. in Fairbanks in April of 1992. Dr. Truch's evaluation was considered by the Anchorage school district's IEP team, and the team revised the goals of the draft IEP based upon Dr. Truch's report. K.B.'s mother requested that the IEP include attendance at an LMB reading clinic scheduled for Anchorage in March/April of 1993. School district authorities seriously considered this request (even though it was outside of an approved IEP). After further consultation with K.B.'s mother, the request was denied for the reason that K.B. was making educational progress under the temporary IEP which appeared to be meeting adequately K.B.'s educational needs.

(7) K.B.'s parents withdrew K.B. from Bear Valley School for a period of 22 days between March 22 and April 17, 1993, during which time she attended the Anchorage LMB clinic at her parents' expense. This expense gives rise to the first of K.B.'s parents' claims for relief. The new IEP approved by K.B.'s parents in April of 1993 did not make provision for special services in the form of attendance at the LMB clinic.

(8) Meaning no criticism of K.B.'s parents, it is a fact that the finalization of a new IEP for K.B. was significantly delayed by requests made by them for additional time to evaluate the proposed IEP and scheduling difficulties for conferences for which the school district was not responsible. The goals and objectives of both the initial proposed IEP and the final approved IEP were essentially the same, calling for improvement of K.B.'s reading skills, improvement of her written expression, and improvement of math skills. During the entirety of the period over which the

new IEP was developed, except for the March/April (1993) period when she was withdrawn by her parents, K.B. received special education services in her classroom at Bear Valley School as a temporary placement under the Fairbanks IEP. During this time, K.B. made progress in her social development as well as in her studies. She received high scholastic grades. Testing done in connection with the LMB clinic in which K.B. participated in March/April of 1993 confirmed that K.B. was performing at or above her grade level in areas of language processing.

(9) Once approved, the new IEP was implemented for the balance of the 1992-93 school year. K.B. successfully completed her fourth grade studies and was advanced to fifth grade.

(10) K.B. was taught by a regular education teacher during the 1993-94 school year; however, that teacher had training and was certified as a special education teacher by the school district. K.B. received special education services in conformance with her then current IEP - - five hours of special education services each week in areas of reading, written expression, and mathematics.

(11) In April of 1994, the annual review of K.B.'s IEP was commenced. K.B.'s parents presented a draft IEP[13] which does not in any identifiable fashion address K.B.'s special education needs, nor the manner and means of addressing them, nor objectives or goals for the current plan year. In the course of the annual review process (attended by K.B.'s mother), it developed that during the current school year to date - - K.B.'s fifth grade - - K.B.'s grades were well above average and she had met each of the goals and objectives of the April 1993 IEP.

(12) When the review team, including K.B.'s mother, turned to the matter of the new goals and objectives, things did not go well despite the fact that the record from the year to date suggested strongly that the IEP then under review was in fact meeting K.B.'s educational needs. K.B.'s mother desired that the school district team consider the results of a

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[13] R. at 1130-42.

Slingerland test report. The school district was ready, willing, and able to consider this data. Inexplicably, and despite school district efforts, a copy of this report was never made available to the school district for its use in assisting K.B.

(13) On April 26, 1994, the school district issued a notice of proposed action, advising K.B.'s parents of its intent to continue special education services and notifying them of an IEP team meeting to be held on May 12, 1994.[14] The meeting was held as scheduled, with personnel conversant with the Slingerland testing in attendance for the purpose of developing goals and objectives for the next IEP year. School district personnel expressed much interest in the Slingerland program, again requesting to see the test results which were again not made available.[15] It appears at this point that both the IEP team and K.B.'s mother were frustrated with the perceived intransigence of the other. It is the court's perception and finding that the school district made every reasonable effort to keep K.B.'s parents informed and involved in the IEP formulation process. K.B.'s mother was (and apparently still is) convinced tat K.B. was not progressing satisfactorily, although the preponderance of the evidence shows otherwise.

(14) After the May meeting, on May 26, 1994,the school district issued a notice of proposed action, stating its intention to implement the school district's updated 1994-95 IEP.[16] Both orally and in writing, K.B.'s mother requested a due process hearing on the proposal to update K.B.'s IEP.

(15) As the IEP process wound down, K.B.'s mother requested an independent educational evaluation and summer tutoring for K.B. The request was evaluated and rejected.

(16) K.B. successfully completed the fifth grade and was advanced to sixth grade. While in the fifth grade, K.B. experienced substantial improvement in her social skills,

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[14] R. at 1153-54.
[15] Tr. at 608-10.
[16] R. at 523.

overcoming her shyness to participate in auditions for a school talent show, as a result of which she was selected and did participate in that show before the entire student body.

(17) K.B.'s parents removed her from Anchorage School District schools for the 1994-95 school year in favor of home schooling. Unfortunately, K.B. was not enrolled in an approved home school program; when, as a result of a school district investigation into her circumstances (why she was not in public school), the foregoing was discovered. K.B. was ultimately enrolled in an approved home study program. However, home school authorities were not informed of K.B.'s identified need for special services and there is no evidence that the home school authorities learned that K.B. was eligible for special education services.

(18) K.B. was enrolled in a LMB program offered at the reading foundation in Calgary, Alberta, in January and February of 1995. K.B.'s parents sought reimbursement from the school district for the cost of this program and expenses associated with it. The school district denied the request.

(19) The due process hearing followed on April 10-12, 1995.[17] In essence, K.B.'s mother and supporting witnesses, including Dr. Truch, testified as to the necessity of K.B. participating in the LMB program. They characterized that program as the "only" means of assisting K.B. Both a preponderance of the evidence and the thoughtful, careful crafted findings of the hearing and review officers suggest otherwise. The court finds that K.B. in fact received educational benefit from regular classroom instruction as a consequence of the regimen of five hours of special instruction per week afforded her under the Anchorage School District IEP(s).

Conclusions of Law

(20) K.B. qualified for the State of Alaska federal assistance program under IDEA and qualified for a "free

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[17] In fact, there was a significant effort made to mediate the dispute between the parties. The mediation failed, and the hearing officer initially designated was replaced.

and appropriate public education". 20 U.S.C. § 1412(1). Entitlement to a free and appropriate public education entitled K.B. to a plan of "personalized instruction with sufficient support services to permit the child to benefit educationally from instruction." Rowley, 458 U.S. at 203.

(21) The court "must give deference to the state hearing officer's findings, particularly when . . . they are thorough and careful." Seattle School Dist. No. 1 v. B.S., 82 F.3d 1493, 1499 (9th Cir. 1996).

(22) It was important and useful for K.B. and her parents to point out the specific review or hearing officer findings with which they found fault in order to assist the court and direct its attention in reviewing the record. With this guidance from K.B. and her parents, the court has reviewed the record and has made its own independent evaluation of the record. Based upon that evaluation, the court has in many instances in substance adopted and replicated the findings of the hearing and review officers because they accurately reflect the record. For the sake of completeness, the court addresses below some of plaintiffs' specific complaints about the findings of the review officer.

(23) K.B. and her parents challenge seven specific findings of the Department of Education review officer's decision. The first has to do with finding of fact No. 1. The court concurs with the review officer's finding.

(24) Plaintiff challenges the review officer's finding No. 3. K.B. takes issue with three phrases employed by the review officer: (1) "the Anchorage School District began providing services"; (2) "based upon the Fairbanks IEP"; and (3) "one month later, began the process of developing a new IEP."[18] K.B. sees these as being gross generalizations. They are not. They are accurate. Based upon its independent review of the record, the court has made similar findings.

(25) K.B.'s parents have taken exception to the review officer's findings which the parents view as critical of them.

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[18] R. at 19.

In particular, findings No. 6 and No. 9 of the review officer[19] are targeted by the parents. The court does not take these findings as unduly critical of K.B.'s parents. Nor are these findings particularly critical to the outcome of the dispute between the parties. Like the review officer, the court has made some findings which the parents may view as criticism; but the court deems it necessary to an even-handed development of the facts of this case to consider the significant delay in the development of a new IEP for K.B. once she was identified as a special education student in the Anchorage School District. It took a long time to develop the IEP, largely because of the nature and extent of the parents' involvement in the process. The court means no criticism in this regard. But by the same token, there should be no criticism of the school district because it took from October of 1992 to April of the following year to reach an agreement as to the IEP. What is important here is that K.B. is shown to have received educational benefits despite the delay in developing a new IEP for her.

(26) K.B.'s parents take exception to the review officer's finding No. 11.[20] This finding does appear to contain a misstatement in that a revised IEP for K.B. was not "adopted" at the May 12, 1994, IEP team meeting. There was at that time still disagreement about the revised IP; and, as set out in the court's findings above (paragraph 14), the school district's proposed IEP was adopted shortly after this meeting.

(27) With respect to the review officer's finding No. 12,[21] K.B.'s parents object to the review officer's statement that they were "planning to 'home school'[K.B.]."[22] Plaintiffs argue that the evidence does not support the finding that K.B.'s mother "planned" to "home school" K.B. because she did not agree with the school district's revised IEP. As set out in the court's findings above, perhaps K.B.'s parents did not immediately formulate a plan to home school K.B., but that is certainly what they did.

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[19] R. at 20.
[20] R. at 21.
[21] R. at 21.
[22] Id.

(28) With respect to the review officer's finding No. 14,[23] K.B.'s parents contend that the review officer has taken Dr. Truch's testimony out of context and inaccurately characterized it. That may or may not be true. The subject of this finding is very technical. Suffice it to say that there is no disagreement demonstrated by the record with respect to the nature and extent of K.B.'s learning disability.[24] Rather, the disagreement is whether the LMB program alone will assist K.B. or whether, as the court finds, her learning disabilities have been adequately addressed by IEPs formulated by the school district with the parents' assistance employing services in the school and without segregating the student (K.B.) from classmates.

(29) Finally, K.B.'s parents challenge the review officer's reliance upon K.B.'s grades as indicia of progress. The court shares the parents' concern about grades, although they certainly are some evidence of achievement. What is important here is that in the course of the review process commenced in April of 1994, the record reflects that in addition to good grades, K.B. had achieved all of the objectives and goals of the initial IEP adopted with parental approval in April of 1993.

(30) Plaintiffs are not entitled to reimbursement for the expenses they incurred as a result of providing K.B. with LMB therapy and her attendance at the Reading Foundation because the procedural violations committed by the school district did not result in the denial of an appropriate education for K.B., the IEPs developed by the school district were "reasonably calculated to enable [K.B.] to receive educational benefits," Rowley, 458 U.S. at 207, and because the LMB therapy provided by the parents was not necessary to confer educational benefit upon K.B. Id. at 182. On the basis of the record before this court and the findings made above, the court concludes that the school district fully complied with these legal requirements through the IEPs

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[23] Id.

[24] Tr. at 476. In fact, Dr. Truch testified that his and the school district's assessments reached the same conclusions and that they only differed in their ways to approach K.B.'s learning disability.

which were developed in consultation with K.B.'s parents by the school district.

(31) The fact that the school district failed to take note of the fact that K.B. was entitled to special education when she was first admitted to Bear Valley was an honest oversight. The school district did not have K.B.'s Fairbanks school records upon her admission. Once they were received, the school district promptly implemented her prior IEP on an interim basis. It was lawful for the school district to take the latter action pending the development of a new IEP. 34 C.F.R. § 300.342, App. 6, question 6. There has been no showing that K.B.'s education was adversely affected during the school year in question by reason of the initial oversight. Indeed, as found above, K.B. performed at an acceptable level without special assistance for the first weeks of the 1992-93 school year.

(32) It is contended by K.B.'s parents that the school district hearing officer improperly admitted the testimony of Dr. Beth Ann Gartiez. Regulations in force at the time of the due process hearing required that each party disclose evidence to be offered at the hearing (except for purposes of rebuttal) five days in advance of the hearing.[25] K.B., et al., contend Dr. Gartiez's testimony was not properly disclosed. The court concludes that Dr. Gartiez's testimony was properly admitted. Her testimony was presented and appears to have been considered by the hearing officers, if at all, as rebuttal testimony only. The foregoing regulations expressly exempts rebuttal testimony from the disclosure requirement. Even if the court we to ignore Dr. Gartiez's testimony, all of the court's above findings would remain as stated.[26] The court concludes that the Anchorage School District hearing officer was entitled to invoke state regulations for the conduct of the due process hearing, and

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[25] 4 AAC § 52.550(f)(5) & (f)(6) (1994).

[26] Dr. Gartiez refuted Kit Roberts' testimony that the LMB therapy was the only appropriate therapy for K.B. Even if the court were to ignore Dr. Garteiz's testimony, all of the court's findings would remain. Other witnesses for the school district, upon whose testimony the hearing officer relied, also testified that the LMB therapy was not the only approach to addressing K.B.'s needs.

the hearing officer did not err in permitting the school district to call Dr. Gartiez as a rebuttal witness.

(33) K.B. and her parents contend that they did not receive proper notices from the school district with respect to the disposition of their 1993 request for LMB services, or their request for "ESY" (extended school year) services. This contention implicates the requirements of 20 U.S.C. § 1415(b)(3) and (c) that a school district provide written notice when it proposes or refuses to change "the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child." It is not at all clear to the court that the notices of which K.B. and her parents complain were required by IDEA. The request for LMB services and the request for reimbursement to them called upon the school district to reopen and revise the previously approved IEP for K.B. That IEP - as approved by K.B.'s parents after K.B. was withdrawn from school to attend the LMB program - did not include LMB services. What K.B.'s parents here complain of is a failure to notify on a subject as to which they concurred ultimately in the school district decision not to include LMB services. Assuming for the sake of discussion, however, that there may have been inadequate notice as to these two items, and assuming for the sake of discussion that an inadequate notice was given as regards the refusal to change K.B.'s IEP so as to include, as a part of her free and appropriate public education, extended school year services, those deficiencies were harmless. It is abundantly clear from the paper administrative record, as well as the hearing transcript, that K.B.'s parents were kept well-informed of the IEP process. They were fully and actively involved in the development of K.B.'s IEP. There has been no showing that the parents' participation in the process of developing an individualized plan for K.B.'s education was adversely affected by a failure to give any notice. K.B.'s mother was informed that the extended school year request was rejected, and suggestions were made for alternate programs in which K.B. might participate. Moreover, the record fails to show that K.B suffered significant or identifiable regression in her learning skills because extended school year services were not afforded her as requested by the parents. The school district

did not err in denying plaintiffs' request for ESY services, nor did the parents' participation in the process or K.B.'s education suffer because of the absence of any particular form of notice.

(34) The school district did not violate the requirement that a child remain in his or her current educational placement during the pendency of due process proceedings. 20 U.S.C. § 1415(e)(3); 34 C.F.R. §300.513. The request for a due process hearing in this case came at the end of the 1993-94 school year. The school district never had an opportunity to face the issue of continuing with K.B.'s extant placement or implementation of the last, revised IEP which it adopted over parents' objections because K.B. was not enrolled in an Anchorage School District school for the 1994-95 school year.

(35) In the course of preparing for the due process hearing, new, independent evaluations of K.B. were obtained. Such evaluations "must be considered by the district in any decision made concerning the provision of a free, appropriate education to the child." 4 AAC 52.540(b). The school district did not breach this requirement. The independent evaluations were considered in the course of the failed mediation of the disagreement between the parties over the 1994-95 IEP for K.B. If the contention is that such evaluations had to be considered outside of the context of the due process proceedings, this did not happen, and did not disadvantage K.B. in any fashion because she was never enrolled in Anchorage School District schools for the 1994-95 school year.[27]

(36) K.B.'s parents assert that the school district failed to assess K.B. in all areas of her suspected disability in violation of 34 C.F.R. § 300.532(f) in that the school district did not properly test K.B. in regards to her auditory processing. The school district did identify and address K.B.'s auditory processing difficulties because the 1993-94 IEP was designed to address auditory weakness and because the school district

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[27] Moreover, the record reflects that the school district endeavored during the summer of 1994 and prior to the 1994-95 school year to arrange an IEP meeting. K.B.'s parents did not cooperate. R. at 548.

sent personnel to learn more about possibly incorporating the LMB therapy into K.B.'s IEP.

(37) Apparently by oversight or inadvertence, the school district's mediation brief was included as a part of the administrative record which went to the Alaska Department of Education review officer who decided this matter. This brief was never admitted into evidence and should not have been included in the record. It is the court's perception that the state review officer did not in any fashion rely upon the school district's medication brief in rendering his decision. The error was harmless. This is especially so in light of the fact that this court reviews the record de novo and makes an independent decision as expressed in the foregoing findings and conclusions. While the mediation brief was included in the administrative record presented to this court, [28] the court has neither reviewed nor considered it.

(38) Based upon its findings of fact and the above conclusions, the court further concludes as a matter of law that the Anchorage school district substantially complied with the procedural requirements of IDEA, and that those procedural violations found or claimed did not result in a loss of educational opportunities or seriously detract from K.B.'s parents' participation in the IEP process.

(39) Based upon its findings of fact and the above conclusions of law, the court further concludes as a matter of law that the individualized education programs developed for K.B. by the Anchorage School District were reasonably calculated to enable K.B. to receive educational benefits.

(40) The record before the court does not support the contention that K.B. could not benefit educationally from instruction without the inclusion of the LMB program in her IEP.

(41) IDEA's overall mandate is to provide each disabled student a free and appropriate education in the least restrictive environment, and IDEA was enacted to address Congress's concern about the "apparently widespread

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[28] R. at 26-53.

practice of relegating handicapped children to private institutions or warehousing them in special classes." Town of Burlington, 471 U.S. at 373. Under the provisions of IDEA, children should not be taken from the regular classroom unless they cannot be educated there, even with extra aids and services. 20 U.S.C. § 1412(5)(B); 20 U.S.C. § 1414(a)(1)(C)(iv). The LMB program which K.B.'s parents have urged upon the school district is highly intrusive. On two occasions, it took K.B. out of the regular classroom setting[29] where K.B. was plainly progressing in both book learning and social skills. The court concludes that the LMB program would not provide K.B. with special services in the least restrictive manner.

(42) In sum, the court concludes that there was a fundamental difference of opinion between school district personnel and K.B.'s parents as regards how best to school K.B. Parental preference alone is not a basis for compelling a school district to provide a special service. Gregory K. v. Long View School Dist., 811 F.2d 1307, 1314 (9th Cir. 1987). Rather, under the IDEA, the school district has the primary responsibility for formulating the IEP. 20 U.S.C. § 1401; 34 C.F.R. 300.346. It is mandatory that parents be involved, but "parents have [no] right . . . to compel a school district to provide a specific program or employ a specific methodology" when the district methods allow the child to benefit from and progress toward the child's IEP goals. Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988). The Anchorage School District did not err in declining to include LMB attendance as a service of K.B.'s IEP. The Anchorage School District has no obligation to reimburse K.B.'s parents for the cost of K.B.'s attendance at LMB programs or the expenses connected therewith.

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[29] The court is not making a misstatement here. The court realizes that K.B. was not enrolled in the Anchorage public schools for sixth grade, although she might have been, and presumably would have been but for a parental decision to remove K.B. from the normal school setting in favor of home schooling and the LMB program in Calgary, Alberta.

Conclusion

In consideration of the foregoing, K.B. and her parents are entitled to no relief on their complaint, and the clerk of court shall enter judgment dismissing their complaint.

DATED at Anchorage, Alaska, this 24th day of September, 1998.

(s) H. Russel Holland, Judge
District of Alaska

[Appendix B - September 24, 1998 Order - Excerpt of Record, pages 242 through 268; Clerk's Docket No. 109]

Appendix C

[This fax heading indicates it was received from Anchorage School Board Member Ferrell, on November 20, 1995]

GRADING ISSUES for Special Education Students

1. Special education students must show educational benefit
   a. meeting IEP goals/objectives
   b. passing grades
   c. promotion from grade to grade

2. Grading for special education students
   a. IEP team needs to determine if the student can do the regular work in the regular classroom with no modifications. If so, then the special education student is graded the same as other students.

   b. If the student needs modifications or adaptation to the curriculum, then grading becomes an issue. What is the grading criteria for that student? Grades need to be addressed at an IEP meeting (with parents and the student, when appropriate) and grading accommodations need to be written on page 4 or attached to the IEP. Parents need to be active participants in this discussion, so they understand what modifications are going to be made to the grading standards and what the expectations are for their student.

   c. For example, if the student is in the fifth grade and is reading on a second grade level, curricular accommodations need to be made in the classroom for all work that needs to be read (like social studies). (Questions to ask, How will the student get the information? What part of the curriculum will the student be responsible for learning? How will the student's learning be measured?) The special education teacher in collaboration with the regular education teacher needs to provide curricular adaptations and grades appropriate for the student. These accom-modations need to be discussed with the parents and addressed in the IEP.

d. On elementary report cards, the teacher can indicate "below grade level" or exactly what the grade level performance is and then give the grade for the student's working level. It is NOT appropriate to indicate that the child is in special education. For some students this method of indicating a lower grade level may not be appropriate and an alternative grading and reporting system may need to be developed (indicate on report card "see an alternative grade report attached") for the student. For example, a checklist of skills or a narrative report may be used to report the student's progress.

e. What if the student just isn't trying? Several issues need to be addressed:
1) Is the work appropriate for the student? Can he/she be successful or is the work at an inappropriate level for the student's skills?
2) Set criteria with parents as to how much work is appropriate for the student.
3) Set up a system where the student makes choices for completing work. If the work is done then there are rewards. Otherwise consequences would be appropriate. (Poor grades could be a consequence if parents have been consulted and there is agreement on grade accommodations and the poor grades are a consequence of the student putting forth no effort. This needs to be part of a grading accommodation plan with parental input.)
4) Set up behavior/work plan with parents and student for work completion and expectations.
5) Setup a system where the student can demonstrate proficiency and not have to do so much work or the same work over and over.
6) Test/assess student to find out appropriate curricular level.

f. Where have there been problems?
1) Grading all students the same
2) C, D and F grades when not discussed with parents. (Make sure messages about progress that go home match letter grade on report card)

3) Years of poor grades, IEP goals/objectives not met or little progress, retention
4) Students and parents do not know expectations for grading - grades just arrive on report cards "mysteriously."

g. Principals and/or APs/special education teachers need to review report cards of special education students BEORE they are sent home. They also need to review grading with the entire staff before report card time.

h. Proactive discussion needs to take place during initial IEP meetings and annual reviews about grading and grading procedures.

i. If you believe grading might be a problem, be proactive and have a grading discussion with your building staff. Work with the special education personnel to determine students who may need to have modifications of grading procedures.

j. Principals need to involve special education personnel to collaborate with regular educators.

k. Regular teacher and special education teachers need to keep good data on students to justify why a student receives a certain grade.

3. Possible Grading Accommodations
   a. Less work/modified assignments
   b. Grading plan/contract
   1) what specific expectations for student on each assignment
   2) specific criteria that needs to be achieved by the child
   3) specify how much needs to be completed per assignment
   4) specify work completion time
   5) quality and quantity of work
   6) role of student and parent in plan
   7) rewards/consequences to plan
   8) how student achievement data will be collected
   c. Modification to testing procedures

Comments on Grading from Rich Villa

How do we grade students with disabilities? Is it fair to give them an A or a B for doing work that is significantly different from the rest of the class or after we have provided them with accommodations and modifications to the curriculum and instruction?

We recognize that a diploma or a grade in and of itself tells nothing about what a child knows believes, or can demonstrate. This is because of the tremendous variability within and across schools as to what a grade or a diploma represents. For example, within a particular school, an earned grade in one math class may not mean the same as the same grade in another math class (e.g., calculus vs. general math, one trigonometry class vs. another trigonometry class). In fact, within the same class the learning of two students receiving the same grade could be vastly different. Many traditional grading practices and procedures are arbitrary and subjective.

The "correct" approach to student assessment is a hotly debated issue. Some advocate the continuation of competitive comparison (i.e., A, B, C, D and F; percentile scores) practices. Others advocate the adoption of outcomes-based assessment strategies. The National Center on Educational Outcomes calls for the identification of outcomes and acceptable performance standards for all students, assessment of students with reasonable accommodations if necessary, and reporting of progress of schools in meeting the stated outcomes (Shriner, Yaseldye, Thurlow, and Honetchlager, 1994). Given this more holistic and flexible approach to assessment, performance-based and other authentic assessment approaches are more compatible and supportive of children with and without disabilities than traditional standardized achievement testing. They give those who wish to know about student performance a much richer picture of what students actually can do and the supports needed to do it than do standardized tests and competitive/normative comparisons of students.

To address the concern of school personnel who want distinctions to appear on report cards and transcripts for students who have different goals or who receive accommodations, teachers can use alternative to traditional grading such as: a) use pass/fail systems of grading, b) have students self-assess, c) contract with students for grades to be obtained, d) use criterion or checklist grading, or e) assemble portfolios.

Another alternative is to use the IEP as a vehicle for grade determination. Students with disabilities have an advantage over other students in that they have an IEP which, when used appropriately, clearly defines objectives, any needed accommodations required during instruction and assessment, and the criteria by which to determine grades. Such clarification of expectations and success and grading criteria certainly would be of benefit to any student.

[Page #] Elementary Special Education November 15, 1995

[Appendix C- Memorandum on Grading - Excerpt of Record, pages 211 - 214; Exhibit to Clerk's Docket No. 18]

Appendix D

[Letterhead of Jermain Dunnagan & Owens, P.C.]

December 7, 1995

Ms. Pamela Bickford
16[8]40 Tide View Drive
Anchorage, AK 99516

Re: Progress Notes

Dear Ms. Bickford:

Enclosed you will find copies of progress notes prepared by Sharon Lester for Kathleen during her fifth grade year at Bear Valley Elementary School. These are the progress notes you had requested in your November 11, 1995 letter to Robyn Rehmann. As I mentioned in my December 5, 1995 letter, these progress notes will also be included in Kathleen's school file hereafter.

Please let me know if you have any further questions or if I can provide any additional information.

Very truly yours,
JERMAIN, DUNNAGAN & OWENS, P.C.
(s) Bradley D. Owens

/sjk
Enclosures
cc: R. Rehmann

[Appendix D - Excerpt of Record, page 226; Exhibit to Clerk's Docket No. 66]

Appendix E

BEFORE THE APPELLATE HEARING OFFICER
ALASKA DEPARTMENT OF EDUCATION

In the Matter of K.B.)
)
_____)

DECISION ON APPEAL

I. Appearances. Page 1
II. Introduction, Question, Short Answer.
A. Procedure. Page 1
B. Question and Short Answer. Page 5
III. Discussion.
A. Statutory and Regulatory Foundation. Page 6
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IV. Findings of Fact, Conclusions of Law, and Order.
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I. APPEARANCES.

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II. INTRODUCTION, QUESTION, SHORT ANSWER.

A. Procedure.

By their June 5, 1995 Notice of Appeal under 4 AAC 52.570, the parents of K.B. have appealed the May 9, 1995 decision of the Anchorage School District's independent hearing officer ("district hearing officer") that they were not entitled to reimbursement

1. of $3,850.00 incurred by them in enrolling K.B. at the Lindamood-Bell Learning Processes Clinic during March and April of 1993 (Par. Ex. A, p. 127)[1];

2. of $ 5,400.00 incurred by them in enrolling K.B. at the Reading Foundation during January and February of 1995 (Tr. 582-3); or

3. of $2,937.76 incurred by them in transportation and lodging costs associated with the enrollment of K.B. at the Reading Foundation during January and February of 1995 (Tr. 584);

and that the district prevailed in this case.[2]

20 U.S.C. sec. 1415 sets out the procedural requirements for state special-education programs. It includes provision for a hearing by the state or local educational agency or by an intermediate educational unit.

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[1] The parents' exhibits are in three plastic-bound pamphlets, lettered "Exhibit A," "Exhibit B," and "Exhibit C," with each volume bearing its own page-numbering sequence. (Exhibit A's pages 300-306 are paperclipped to the inside back cover of the pamphlet.) I will use the exhibit and page designations (e.g., Par. Ex. A, p. _). The school district's exhibits are in a three-ring binder, grouped under numbered, tabbed dividers, with most pages numbered and some pages between pages 195 and 425 [all of Tab 14], which the district hearing officer excluded, with the acquiescence of the district, Tr. 729). In this decision, I will refer to the tab numbers as exhibit numbers, followed by a page number or letter (e.g., Dist. Ex. 10, p. _). I will cite the three-volume, consecutively-page-numbered, 732-page transcript "Tr." with a page designation.

[2] The hearing was held April 10, 11, and 12, 1995 in Anchorage, Alaska. References in this decision to the parties' exhibits are to the exhibits offered at that hearing.

20 U.S.C. sec. 1415(c) requires the opportunity for an appeal to the state educational agency if the hearing was conducted by the local agency or an intermediate unit. The appeal consists of "an impartial review" of the hearing, and the reviewing officer is to "make an independent decision."

I was appointed June 22, 1995 by the Alaska Department of Education, under 4 AAC 52.570(c), to conduct the impartial review of the hearing and render a decision on the appeal on behalf of the department. 4 AAC 52.570(d) directs the appellate hearing officer as follows:

> The official conducting the review on behalf of the department shall
> (1) examine the entire hearing record;
> (2) ensure that the procedures at the hearing were consistent with the requirements of due process;
> (3) seek additional evidence, if necessary; if a hearing is held to receive additional evidence, the rights stated in 52.550(f) apply; appointment of a hearing officer, if any, is subject to 4 AAC 52.560;
> (4) afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official; and
> (5) make an independent written decision, stating the facts on which it is based, on completion of the review.[3]

Compare, 34 C.F.R. sec. 300.510(b)(1)-(5), which are virtually identical.

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[3] In accordance with this regulation, I have examined the entire hearing record that was furnished to me by the Department of Education, the district hearing officer, and the parties. (I note the omission of some pages [e.g. 542 and 566] in the copy of the transcript furnished me, but the omissions do not appear significant.) I find nothing that indicates that the district hearing violated due process. I have not conducted an additional hearing nor sought additional evidence, but have afforded the parties opportunity for written argument and have reviewed their lengthy briefs. My response to paragraph (5) of 4 AAC 52.570(d) will be set out in the main text, below. With regard to the briefs, I note that their full development and generally careful citation of authority and the record were most helpful, as were the copies of relevant court decisions that both parties furnished.

While appropriate deference will be given to the district hearing officer's analysis and decision, this administrative review constitutes an independent review of the facts, procedure, and law. Court decisions[4] on the standard of judicial review of agency action provide some analytical guidance; however, the courts are not governed by all of the same statues and regulations applicable to this administrative review. Compare 20 U.S.C. sec. 1415(c), on administrative review, with 20 U.S.C. sec. 1415 (e)(2), on judicial review. I recognize, however, that, under Doyle, above at n. 3, the administrative appeal authority must adhere to "the fact-finding norm" when reviewing the district hearing officer's findings, and those findings "are entitled to prima facia correctness." 953 F.2d at 105. According that status to the hearing officer's findings does not vitiate the independence of the reviewing officer or the reviewing officer's decision.

During our June 27, 1995 teleconference, the parties requested an extension under 4 AAC 52.570(e) and 34 C.F.R. sec. 300.512(c), and agreed to a briefing schedule as stated in my Briefing Order of that date.[5] So the July 7, 1995 deadline for issuance of the Department of Education decision no longer applies.

B. Question and Short Answer.

Under the relevant federal and state statutes and regulations, three primary issues are raised by this appeal:

1. Is a parent who places a child in an intensive, special program outside the public school, and at the parent's own expense, before an individualized education program (IEP) is agreed upon, entitled to reimbursement for that expense?
2. Is a parent who places a child in an intensive, special program outside the public school, and at the parent's own

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[4] For example, Kerkam v. McKenzie, 862 F.2d 884, 887(D.C. Cir. 1988), and Block v. District of Columbia, 748 F.Supp. 891, 895 (D.D.C.1990); Doyle v. Arlington County School Board, 953 F.2d 100 (4th Cir. 1991).

[5] Subsequently, at the request of the parties, that schedule was modified as shown in my August 3, 1995 Amended Briefing Order and my August 4, 1995 Second Amended Briefing Order. Final schedule: Brief of Appellants, July 25, 1995; Brief of Appellee, August 21, 1995; Appellants' Reply Brief, September 11, 1995.

expense, entitled to reimbursement for that expense when the placement was not in accord with the agreed-upon IEP and agreement on a revised IEP had not yet been reached?
3. Is a parent in the situation described just above in question #2 entitled to reimbursement for transportation and lodging expenses necessitated by the placement?

As discussed below, I conclude that the answer to all three questions is no.

III. DISCUSSION.

A. Statutory and Regulatory Foundation.

The Education of the Handicapped Act (EHA), 20 U.S.C. sec. 1400 et seq., was amended by the Education for All Handicapped Children Act of 1975 (EAHCA). Effective October 30, 1990,[6] the Individuals with Disabilities Education Act (IDEA) made further amendments and gave its name to the relevant chapter (20 U.S.C. ch. 33 [i.e., sec. 1400 et seq.]). See, 20 U.S.C. sec. 1400(a). Those Acts together, along with the regulations in 34 C.F.R. Part 300, establish a system of federal funding for and regulation of state education of "children with disabilities" (called "handicapped children" before IDEA took effect in 1990). In this decision, the federal statutes will be referred to as "IDEA" or "the Act."

Alaska's response appears in AS 14.30.180-14.30.350 and 4 AAC 52, where these children are called "exceptional children."

To qualify for federal assistance, a state must assure that all children with disabilities have the opportunity for a "free appropriate public education"(FAPE). 20 U.S.C. sec. 1412(1). The state must adopt a system that assures that all children receive an appropriate education "regardless of the severity of their disability." 20 U.S.C. sec. 1412(2)(C).

In the case of an individual child, this FAPE requirement is satisfied if the state provides the child with "personalized

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[6] Section 1002 of Public Law 104-476 (see, 104 Stat. 1151) says that the amendments made by that Act take effect October 1, 1990. However, that Act was not approved until October 30, 1990.

instruction with sufficient support services to permit the child to benefit educationally from the instruction." Board of Education v. Rowley, 458U.S. 176, 203, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690, 710 (1981). This quoted language is repeated in 4 AAC 52.990(1)'s definition of "appropriate educational program." However, the child's program must provide more than a de minimis or trivial benefit. Polk v. Cenral Susquehanna Inermediate Unit 15, 853 F.2d 171 (3rd Cir. 1988), which includes a rather extensive discussion, analysis, and distinguishing of Rowley.

"Free appropriate public education" includes "special education" and "related services." 20 U.S.C. sec. 1401(a)(18); 34 C.F.R. secs. 300.1 and 300.8. The latter term covers a broad range of "supportive services," including transportation. 20 U.S.C. sec. 1401(17); 34 C.F.R. sec. 300.16(a) and (b)(14). Elementary and secondary schools include "residential schools."[7] 20 U.S.C. sec. 1401(a)(9) and (10). 34 C.F.R. sec. 300.302 provides that "[i]f placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child."

The federal law requires that representatives of the local educational agency or an intermediate educational unit, "the" teacher, the parents or guardian of the child, and, when appropriate, the child (20 U.S.C. sec. 1401(a)(19)) develop an individualized education program for each disabled child (20 U.S.C. secs. 1401(a)(18) and 1414(a)(5)). According to the United States Supreme Court, "the IEP . . . if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." Rowley, at 458 U.S. 203-4, 73 L.Ed.2d at 710.

20 U.S.C. sec. 1415 requires state and local educational agencies to establish procedures for parents to examine

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[7] While either the Lindamood-Bell clinic conducted in Anchorage nor The Reading Foundation session in Calgary involved a "residential school," K.B. resided in Calgary, away from home, for the purpose of attending that session.

records, file a complaint, have an administrative hearing, and have a state-level administrative review of that hear. Subsection (e) provides for judicial review in state or federal court, with express authority to "grant such relief as the court determines is appropriate." The U. S. Supreme Court has held that this provision confers authority to order reimbursement where procedural violations occurred. Burlington School Committee v. Mass. Dept of Education, 471 U.S. 359, 370, 105 S.Ct. 196, 2003, 85 .Ed.2d 385, 395 (1985).

However, "[p]rocedural flaws do not automatically require a finding of a denial of a FAPE... [P]rocedural inadequacies that result in the loss of educational opportunity, Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982 (4th Cir. 1990), or seriously infringe the parents' opportunity to participate in the IEP formulation process, Roland M., 910 F.2d at 994; Hall, 774 F.2d at 635, clearly result in the denial of a FAPE." W.G. v. Bd. of Trustees of Target Range School District No. 23, 960 F.2d 1479, 1484 (9th Cir. 1992), where the court held the flaws serious enough to warrant reimbursement.

"[T]he burden of proof is not on either party; the burden of persuasion is by a preponderance of the evidence." 4 AAC 52.550(f)(9).

B. Basic Facts.

The parties do not dispute the following facts:

1. K.B. is a girl, born December 7, 1981, who is "learning disabled" within the meaning of former (i.e., before the 1993 amendments took effect) AS 14.30.350(3)(E), one of the categories of disabled (or "exceptional") children under 20 U.S.C. 1401(a)(1)(A)(i). See, page 1 of K.B.'s IEP dated April 21, 1993; Par. Ex. A, p 129; Dist. Ex. 5, p.32.

2. K.B. had been enrolled in the Fairbanks North Star Borough School District, where she was receiving special education services under an IEP agreed to by her mother. Par. Ex. A, pp. 59 –65. The family moved to Anchorage, and K.B. was enrolled in the 4th grade in the Anchorage School District, August 26, 1992, and began the 1992-1993 school

year at Bear Valley Elementary School. Dist. Ex. 10, p.67; Par. Ex. A, p. 300; Tr. 15 –15, 192. Her Fairbanks IEP was due to expire September 27, 1992. Par. Ex. A, p. 65; Dist. Ex. 2, p. 16.

3. K.B.'s parents placed her in the Lindamood-Bell "intensive treatment" clinic (in Anchorage) for four weeks in March and April 1993, and in therapy at The Reading Foundation, in Calgary, Alberta, Canada, in January and February 1995. Both placements were outside of any IEP, and the parents now seek reimbursement, which was denied by the Anchorage School District.

4. By a letter dated June 5, 1994, K.B.'s mother requested a "due process hearing." Par. Ex. A, p. 171; and see, Dist. Ex. 12, at p. A, for the district's reply. A hearing officer was appointed, an attempt at mediation followed, and eventually another hearing officer was appointed at the request of Mrs. B. (Par. Ex. A, p. 254), resulting in the April 10 – 12, 1995 hearing.

C. Analysis.

Since the federal law requires the state to meet federal standards, as discussed above, and AS 14.30.335 authorizes the state Department of Education (which adopted 4 AAC 52) to "do all things necessary to qualify for federal funds that are available to the state for the education of exceptional children," the state statutes and regulations must be read as being intended to conform to the federal law. Therefore, federal case law interpreting the federal provisions will be applied (I have not been referred to, nor have I found, any case law interpreting he Alaska statutes or regulations.)

There is no question that the Anchorage School District is required to "make special education and related services available." 4 AAC 52.230(a). Similarly, there is no question as to K.B.'s parents' right to a hearing (4 AAC 52.550(a)(1)), to an administrative appeal (4 AAC 52.570), and to judicial review (4 AAC 52.570(f), 20 U.S.C. sec. 1415(e)(2). The U. S. Supreme Court has ruled that

> . . . a court's inquiry in suits brought under [20 U.S.C. sec.] 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act?

> And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Rowley, at 458 U.S. 206-7, 73 L.Ed.2d 712. If the courts can require no more, the district hearing officer and the reviewing officer can require no more. I will take the approach set by the court.

K.B.'s parents' right to reimbursement depends upon whether the Anchorage School District was providing K.B. a FAPE. In determining whether the district has done so, we must, in turn, determine whether the procedures employed by the district in developing her IEP satisfactorily complied with the statutory and regulatory requirements, and determine whether the IEP itself was appropriate.

The case law tells us that procedural flaws do not automatically mean denial of a FAPE. They must be significant ones. See, Target Range, Burke County, Roland M., and Hall, above. K.B.'s parents argue that the district's overlooking of K.B.'s special-education eligibility from August 26 to October 6, and failing to implement the IEP procedures until November 6, 1992, is such a flaw.

However, they have not shown that K.B. was at all disadvantaged by that oversight or that the oversight is what caused her parents to place her in the Lindamood-Bell clinic in March and April of 1993. The evidence shows that, as soon as the district personnel discovered the oversight, they implemented K.B.'s Fairbanks IEP on a temporary basis, gathered information, and began the formal IEP development process within a relatively short time -- a process resulting in an agreed-upon IEP in April 1993. To hold that oversight as crucial, would mean that the district could not correct an admitted error.

K.B.'s parents also raise notice objections. However, in the context of the communications between the parties -- written correspondence, pone calls, scheduled IEP meetings that were postponed at the request of one or both of the parents -- the technical failure to provide 34 C.F.R.

300.505(a)(2)'s full written explanation of the refusal to include Lindamood-Bell training in K.B.'s IEP simply cannot be said to have prevented Mr. and Mrs. B. from participating in the IEP-development process. Nor can the decision-making relationship between the IEP team and the district's administrative officers.

From the perspective of this review, a preponderance of the evidence discloses not a perfect IEP-development process, but one that the district tried to make conform to the requirements and to the intent of Congress in assuring K.B. an appropriate education.

The case law also tells us that the state (or district) need not provide a program that "maximizes" the child's potential, but that it must seek to assure more than de minimis or trivial educational benefits. K.B.'s parents explain that the Lindamood-Bell and The Reading Foundation clinics in which they enrolled K.B. were not ones aimed at maximizing her potential, but were simply ones that addressed her needs. They claim that the district's efforts merely worked around those needs and did not address them. However, at the time of the 1993 Lindamood-Bell clinic, the district was providing services, temporarily, under the Fairbanks IEP to which Mrs. B. had agreed in 1991. Then it provided services under the Anchorage IEP to which the B.'s had agreed on April 1993. The evidence indicates that both them were aimed at K.B.'s particular needs.

In fact, while attending the Anchorage school under her IEP's K.B. met [the] all of the goals and seven of the eight objectives stated in them. And she was able to pass from grade to grade. Her parents argue that merely passing from grade to grade is not enough, and that language in Rowley to the effect that it is enough (458 U.S. at 204, 73 L.Ed.2d at 710, n. 25) must be read in the narrow context of the specific facts of Rowley. However, K.B. was not merely receiving passing marks; she was receiving excellent marks. Clearly, she was getting a substantial educational benefit from the district.

At the time of the 1995 session at The Reading Foundation, K.B.'s parents had taken her out of school in the Anchorage

District for the 1994/1995 school year, to provide home schooling, apparel because they disagreed with the May 12, 1994 IEP that the district sought to implement. However, the home-schooling program for the Fall semester was not one approved by the state Department of Education, and the one for the Spring semester did not include a special-education component. The evidence indicates that the district's May 12, 1994 IEP for K.B. was adequate and more certainly provided for K.B.'s particular needs.

To justify taking her out of school and then placing her in the session at The Reading Foundation, K.B.'s parents say that her old (i.e., April 21, 1993) IEP should have been used for the 1994/1995 school year, arguing that the "stay-put" concept in 20 U.S.C. sec. 1415(s)(3) required it. (Also, see, 4 AAC 52.580.) The Congressional findings and purpose in 20 U.S.C. sec. 1400(b) and (c) show that the Act is aimed at a number of problems. Two rough groupings are relevant to sec. 1415(e)(3): (1) the situation where a child is in private or public school residential or otherwise, and either the parents or the school administrators want to change the placement; and (2) the situation where a child is not in, but is applying for admission to, public school, whether excluded because of his or her disability or otherwise. Reading 4 AAC 52.580 and 20 U.S.C. sec. 1415(e)(3) together, it is clear that they do not resolve the issues in this case.

> It is clear to this Court that the purpose underlying subsection 1415(e)(3) is to ensure that handicapped students are not forced to await outside an educational setting the final outcome of a placement determination, whether previously determined or newly sought.

Logsdon v. Board of Education of Pavilion Cent. S. D., 765 F.Supp. 66, 68 (W.D.N.Y. 1991).

The fact that the district disagreed with the B.'s as to the need to include a full Lindamood-Bell program in K.B.'s IEP does not mean that such a program would be a bad one or that the district was preventing the B.'s from participating in the process. It simply means that the district determined that such a program was not required in order to provide K.B. an FAPE.

Moreover, "Congress has indicated a very strong preference for 'mainstreaming,' educating handicapped children with children who are not handicapped." Gillette v. Fairland Board of Education, 725 F.Supp. 343, 346 (S.D.Ohio 1989); 34 C.F.R. sec. 300.550(b). The Anchorage School District's IEP took this approach.

There is no question that a "free appropriate public education" can include a residential placement and a private placement at public expense. 20 U.S.C. sec. 1401(a)(9) and (10); 34 C.F.R. secs. 300.302 and 300.348. But such a placement is not required if specially tailored instruction can be combined with work in the regular classroom to achieve a significantly educational benefit for the child.

In Burlington, above, the father of a disabled child rejected the school district's proposed IEP, sought review by the state agency and, in the meantime, enrolled the child in a private school for special education. The state agency had decided that the proposed IEP was inappropriate and that the father's choice was the appropriate one, justifying reimbursement. Here, based on a preponderance of the evidence, I cannot rule that the district's IEP was inappropriate. Therefore, reimbursement is inappropriate.

If the local education agency agrees to private placement, there is no issue. If an independent hearing officer rules in favor of the parents' private placement, the courts tell us that the parents are entitled to reimbursement. Neither situation is present here.

For K.B.'s parents to prevail in this matter, a preponderance of the evidence must show not only that the Lindamood-Bell and The Reading Foundation clinics were helpful to K.B. but that the district's IEP's were inappropriate due to their failure to include those clinics. A preponderance of evidence must also establish that the school district significantly failed to follow the procedures required by the Act and its implementing regulations and that the IEP developed for K.B. failed to provide her with a "free appropriate public education." I conclude that the preponderance of evidence does not support that position,

and that it, in fact, supports the district's position and the district hearing officer's decision.

As to the three questions posed above, at page 5, I conclude that

(1) the B's are not entitled to reimbursement for the Lindamood-Bell clinic expenses incurred before the district's IEP was agreed upon and while K.B. was temporarily receiving special education services under the Fairbanks IEP to which Mrs. B. had agreed in 1991; that unilateral placement in the clinic was not necessary in order to provide K.B. an FAPE, and was at her parents' own risk;

(2) the B's are not entitled to reimbursement for the cost of the session at The Reading Foundation, incurred before agreement on a revised IEP could be reached; the ultimate responsibility for the IEP, and thus for the decision as to what is to be included in it, is the district's; the disagreement between the parties does not mean that the parents are being denied participation in the IEP's development; they cannot dictate its terms; Gregory K. v. Longview School Dist., 811 F.2d 1307(9th Cir. 1987); and

(3) the B's are not entitled to reimbursement for lodging and transportation expenses incurred in connection with the session at The Reading Foundation; this claim necessarily fails when the claim for tuition (question 2, just above) fails.

IV. FINDINGS OF FACT, CONCLUIONS OF LAW, AND ORDER.

A. Findings of Fact.

I find the basic facts to be as set out above in Part III.B. of this Decision, which are not disputed in the briefs of the parties. Additional relevant facts are set out below. Like those above, some of the following facts are not disputed. As to some others, the dispute is not so much about the existence of the fact as it is about the significance or interpretation of the fact in the context of the overall disagreement on whether the district is obligated to pay for the two special clinics.

Without going into excessive detail, I find from the record that

1. K.B.'s August 26, 1992 Anchorage enrollment form stated that she was eligible for special education services. Dist. Ex. 10, p. 67; Tr. 192.

2. Notwithstanding the information on the enrollment form, the school district did not provide special education services to K.B. before October 6, 1992. Par. Ex. A. p. 300; testimony of Sharon Lester, special education teacher, at Tr. 13 – 19; 63 – 66.

3. Following receipt of K.B.'s Fairbanks IEP and related materials on October 6, 1992, the Anchorage School District began providing special services based on the Fairbanks IEP, and, one month later, began the process of developing a new IEP. Par. Ex. A. pp. 300, 302; Tr. 72.

4. A multi-disciplinary team (MDT) evaluation of K.B. was performed in November 1992, and the MDT report was dated December 3, 1994. Par. Ex. A. p. 81.

5. The first Anchorage IEP meeting was held December 17, 1992, and was attended by K.B.'s mother. Mrs. B. did not sign the IEP at that time, indicating that she wanted an independent review of it. Par. Ex. A. pp.89, 300; Dist. Ex. 10, p. 69.

6. Another IEP meeting was scheduled for February 11, 1993 and following requests by K.B.'s mother, was re-scheduled for February 25, 1993 and then re-scheduled for March 4, 1993. Par. Ex. A. pp. 109 – 111, 301; Dist. Ex. 10, pp. 87 – 91.

7. No agreement was reached at the March 4, 1995 meeting, and Mrs. B. presented a letter to Dan Hope, then the school district's director for special education, stating her intention "to include on the I.E.P. a session of intensive therapy, conducted by clinicians from the Lindamood-Bell Clinic, scheduled to begin March 22 and ending April 17, 1993." Par. Ex. A. pp. 113, 301; Dist. Ex. 10, p. 99.

8. K.B. attended the four-week Lindamood-Bell clinic (in Anchorage), beginning March 22, 1993, at a cost of $3,850. Par. Ex. A. pp. 126, 127. Mrs. B.'s requests for reimbursement were denied (March 23, 1993 and May 25, 1993). Par. Ex. A. pp. 125, 302.

9. Another IEP meeting was scheduled for April 8, 1993 and re-scheduled at the request of Mrs. B. Par. Ex. A. pp. 120, 121, 301; Dist. Ex. 10, pp. 101, 102.

10. An IEP meeting was held April 21, 1993, attended by Mr. and Mrs. B., and they signed the IEP. Changes in the draft were made at the parents' request. Par. Ex. A. pp. 128, 129, 302; Dist. Ex. 10, pp. 105, 106; Tr. 40, 41.

11. On April 21, 1994, the annual review meeting was held. Then, an IEP meeting was held May 12, 1994, attended by K.B.'s mother, who did not agree with the IEP adopted at that time. See, the IEP (Dist. Ex. 9, pp. 59 – 66), the last page of which notes the lack of agreement (Dist. Ex. 9, p. 66; also see, Par. Ex. A. pp. 166, 303–305).

12. K.B.'s parents did not enroll her in school for the 1994/1995 school year, planning to "home school" her. Mrs. B. testified that it was because she did not agree with the district's revised IEP. Tr. 564.

13. While K.B. was in a state-certified home-school program that did not include a special-education component (Dist. Ex. 11, p. 194), her parents placed her in a six-week program of "intensive therapy" at The Reading Foundation, in Calgary, Alberta, Canada, in January and February of 1995. Par. Ex. A. p. 281; Tr. 582 – 584.

14. K.B.'s parents have emphasized her "auditory processing" difficulties, stemming from early-childhood ear infections. However, in his report following K.B.'s February 15, 1995 testing, Dr. Steve Truch, of The Reading Foundation, summarized her progress over what appears to be at least a two-year period: "In terms of the decoding/encoding process, [K.'s] phonological (auditory) processing has remained strong as her score of 100 on the LAC Test has now stabilized over time." Par. Ex. A. p. 282.

15. K.B.'s education in the Anchorage School District was progressing more than just satisfactorily. To illustrate, for the 1992/1993 school year's final report card, she achieved three A's, three B's, and one C (Dist. Ex. A. p. 39), and passed to the fifth grade; and during the 1993/1994 school year, she met all of the goals and seven of the eight objectives contained in her IEP, and she achieved an A, four B's, and two C's on her final report card (Dist. Ex. A. pp. 40 - - 42), and passed to the sixth grade.

16. The district hearing officer's essential findings of fact, as set out in her May 9, 1995 decision, pages 4 – 12, are supported by a preponderance of the evidence. While her specific wording in some instances has perhaps prompted argument by K.B.'s parents, the substance of those findings is supported by the evidence.

B. Conclusions of Law.

In light of applicable federal and state statutes and regulations and relevant judicial decisions, I make the following conclusions of law:

1. The April 10 –12, 1995 district-level administrative hearing did not violate the due process clause of either the Alaska or the United States constitution.

2. The district's procedures in developing an IEP for K.B. contained minor, technical violations of IDEA and the regulations adopted under that Act, but, applying the standard in Target Range, they were not significant and do not require invalidating the IEP on that basis.

3. The IEP proposed by the district December 17, 1992 and, with changes, agreed upon April 21, 1993 was adequate for providing K.B. a "free appropriate public education." In addition, they May 12, 1994 revised IEP was similarly appropriate.

4. The special programs in which K.B.'s parents enrolled her in April and March 1993 and in January and February 1995, while helpful, were not necessary to be included in the

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district's IEP in order to assure K.B. of an "educational benefit" as required by the IDEA.

5. Testimony of Dr. Beth Ann Garteiz was properly admitted, since 4 AAC 52.550(f)(5) and (6)[8] exempt rebuttal testimony from the five-day exclusionary rule and the fact that she could have been called as a primary witness is not determinative. In addition, the flat five-day exclusionary rule in 34 C.F.R. sec. 300.508(a)(3)must be interpreted in harmony with the federal statute under which it is adopted -- 20 U.S.C. sec. 1415(d). Nevertheless, I have not found it necessary to rely on her testimony in conducting this review and reaching this decision.

6. The parents' points on appeal, regarding the impartiality and qualifications of the district hearing officer, as stated in the June 5, 1995 Notice of Appeal, have been abandoned since hey have not been argued in the briefs.

C. Order.

Therefore, IT IS ORDERED that

1. K.B.'s parents are not entitled to reimbursement from the Anchorage School District for the expenses identified above, at page 2;

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[8] I note that the version of 4 AAC 52.550(f)(6) quoted in the Brief of Appellants (p. 3) and Appellants' Reply Brief (p. 5), and apparently relied on in he Brief of Appellee (pp. 4 – 6), is the pre-11/23/94 version. The version of (f)(5) and (6) currently in effect, and in effect at the time of the hearing and preparation for it, reads as follows:

> (f) The hearing must be recorded and must be conducted according to the following rules:
>
> (5) each party shall disclose any evidence to be offered at a hearing for other than rebuttal purposes at least five days before the hearing;
>
> (6) each party has the right to object to the introduction of any evidence at the hearing that has not been disclosed to the other party at least five days before the hearing; upon the objection of any party, the hearing officer shall prohibit the introduction of evidence not timely disclosed in accordance with this paragraph;
>
> * * *

2. the May 9, 1995 decision of the district hearing officer is affirmed;

3. under 4 AAC 52.570(f) and 34 C.F.R. sec. 300.510(d), this decision is final, subject to appeal in either the state superior court or the federal district court.

DATED: September 14, 1995, Juneau, Alaska

(s)Arthur H. Peterson
Appellate Hearing Officer

CERTFICATION

I certify that, on September 14, 1995, a copy of this document was mailed, first class postage prepaid to:

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[Appendix E - Administrative Record pages R-0002- R-0025]